

Mr. Ch. Lord Kinnaird
Act
James Hunter

January 27. 1761.

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INFORMATION

F O R

CHARLES Lord KINNAIRD, Pursuer;

A G A I N S T

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James Hunter Tenant in *Inchture*, Defender.

SIR George Kinnaird, with Consent of John Kinnaird of April 8. 1678.
Inchture, upon the 18th of April 1678, executed a Tailzie or Deed of strict Settlement of that Estate, in favour of himself in Life-rent, and Sir Patrick Kinnaird, his Son, in Fee, with a Series of other Substitutions; but with a reserved Power to himself, without Consent of his said Son, or the other Heirs of Entail, to alter and innovate the Tailzie, to sell and dispose of the Lands, and to contract Debt thereon.

By this Tailzie there is indeed no express Prohibition against setting of Tacks for any Number of Years beyond a limited Endurance; but there is a general prohibitory Clause, conceived in the following Words: "That it shall no wise be lawful to the said Sir Patrick Kinnaird, nor to the remanent Heirs of Tailzie *respectively* and *successively* above specified, succeeding in the foresaid Lands and Estate by virtue of the Tailzie and Substitution above written, nor any of them, nor their forefaids, to innovate or infringe said Tailzie, nor to sell, alienate, dis-pone, or dilapidate said Lands and Estate, or any Part or

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" Portion

" Portion thereof, nor contract Debts or Sums of Money, or
 " do any other Facts by which the foresaid Lands and Estate,
 " or any Part thereof, may any wise be apprised, adjudged, or
 " evicted, or otherwise affected, in prejudice and defraud of the sub-
 " sequent Heirs Male and of Tailzie aforesaid." And this Prohi-
 bition is inforced by the usual irritant and resolute Clauses:
 " So that said Tailzie, according to the genuine Intention
 " and Meaning thereof, shall, in all time coming, stand invio-
 " lable and irrefragable, notwithstanding of whatsoever Prac-
 " tice or Custom made or to be made in the contrary."

Sir George Kinnaird (afterwards created Lord Kinnaird of Inchture) was succeeded by his Son Lord Patrick the First; who was succeeded by Lord Patrick the Second; who was again succeeded by his Son Lord Patrick the Third.

1724. Lord Patrick the Third, last above mentioned, having contracted sundry Debts, which he alledged did in a great Measure arise from Sums which he had been obliged to borrow to clear off the Tailzier's Debts, and which had been accordingly so applied, though he had neglected to take Conveyances, brought an Action of Sale, before this Court, against the Heirs of Entail, for obtaining Authority to sell Part of the tailzied Estate for Payment of the aforesaid Debts.

Lord Patrick the Third died in 1727; and the Process lay over till the 1734; when it was revived by Charles Lord Kinnaird, lately deceased, who had then succeeded to his Nephew Lord Patrick the Third.

But the Question never came to any Decision, by reason of a Compromise, whereby the late Lord Kinnaird became bound to pay the Creditors 14,000 Merks annually, until they should be completely paid of their Debts: And as this Sum behoved to be paid out of the first and readiest of the Rents, he was constantly under Straits and Difficulties; whereby, for a Penny of ready Money, he could have been induced to grant the most irrational Deeds.

And thus it was, that Many of his Tenants, taking Advantage of his Necessities and Facility, impetrated from him Tacks

of



of almost the whole Estate, for a very long Endurance, many of them granted when he himself was of a very great Age, so that, in the Course of Nature, he could not live long; and yet some of these Tacks were made to take place at very distant Periods, without any additional Rent or Grassum, further than, as it may be supposed, that some trifling Sum, by way of Grassum, had been thrown out for a Bait at granting the original Lease. And as one of these Tacks did comprehend the very Mains and Parks about the Mansion-house, there is but too much Reason to think, that, as the Lady, who by this time had conceived a most groundless Prejudice against the present Lord, for no other Reason but that he was her Husband's presumptive Heir, and which had manifested itself in the feigned Production of two spurious Children; so, from the same Motives, she countenanced and encouraged the granting of these Tacks, in order to render the Succession as unprofitable as possible to the present Lord.

And, more particularly, Mr George Kinnaird, who was then Tacksmen of the whole Estate, with Consent of *Charles Lord Kinnaird* last deceased, by Deed, of this Date, set in Tack to Nov. 18. 1730, the said *James Hunter*, and his Heirs, (excluding Assignies), the two Rooms in *Inchtture*, as then possessed by the said *James Hunter* himself, for the Space of nineteen Years, commencing at *Michaelmas 1730*, for Payment of 32 Bolls Wheat, 42 Bolls Barley, 42 Bolls Oat-meal, some Poultry, &c.; so that this Tack would have run out at *Michaelmas 1749*.

But, in the Year 1738, when there were eleven Years of the Oct. 9. 1738. Tack yet to run, the aforesaid *Charles Lord Kinnaird* was pleased to grant a Prorogation, in favour of the said *James Hunter*, his Heirs and Assignies, for the Space of no less than twenty-five Years, to commence at the Expiration of the former Lease; thereby prorogating the same from the 1749, when it would have expired, to the 1774.

By this Prorogation, sundry very extraordinary Privileges were granted to *James Hunter*; amongst others, he was allowed to build a Pigeon-house, of any Dimensions he pleased, upon any

any Part of said Lands ; a Privilege which the Law is sparing of even to the Heritor himself, but which is believed to be seldom granted to a Tenant.

But Matters did not rest here : For, in order to furnish a Pretence for a fresh Prorogation of said Lease, the said *Charles Lord Kinnaird*, of this Date, granted a Tack to the said *James Hunter*, his Heirs and Assignies, of that other Part of the Lands of *Inchturie* then possessed by *Patrick Mitchel*, for the Rent or Tack-duty of 11 Bolls Wheat, 32 Bolls Barley, 32 Bolls of Oatmeal, Poultry, &c. for the Space of thirty-eight Years, commencing from *Whitsunday 1755*; so that this Tack would not expire till *Whitsunday 1793*.

And, in pursuance of this very notable Scheme, the said *Charles Lord Kinnaird*, by Deed of this Date, reciting the before-mentioned three Tacks and Prorogations, and subsuming, that the Lands then possessed by the said *James Hunter*, and those formerly possessed by the said *Patrick Mitchel*, lay so interwoven, that they could not be laid out in proper Fields, or ditching or draining, whereby the Improvement of said Lands was impeded; therefore, and as an Encouragement to the said *James Hunter* to ditch and drain said Lands, and lay them out in proper Fields, and otherwise improve the same, he prorogated the Tack 1730, and Prorogation thereof in 1738, for the Space of other nineteen Years, to commence from and after the Issue of said former Tack and Prorogation, under Pretence of making it coeval with the other Tack in 1754. And thus your Lordships will perceive, that this last mentioned Tack was granted recently before the late Lord *Kinnaird's* Death, when, by reason of his great Age and Infirmities, he could not, by the Course of Nature, live above a Year or two, during the Currency of the former Lease, and only to take place at a very distant Period, and without any Rise of Rent, though the whole Lands in *Scotland* were making great Advances in the Increase of their Rents. Whether any Grassum was paid or not, the Pursuer cannot take upon him to say : Thus far he knows, that a very small Sum would have gone

gone a great Length with the late Lord; though it is reasonable to think, that if any Grassum worth mentioning had been paid, the Defender would not have kept silent upon that Article.

There is one Circumstance extremely remarkable in this Prorogation: That whereas, by the former Tack, *James Hunter* had been allowed, *ex gratia*, to build a Pigeon-house upon his own Expences, and which by this Time he had accordingly done, and was to reap the Profits thereof for such a Number of Years; yet, by this Prorogation, instead of Lord *Kinnaird's* getting a suitable Fine or Grassum for renewing the Lease without any Augmentation of Rent, he is taken bound to repay to the said *James Hunter*, at the Expiry of the Tack, the Value of the Pigeon-house, as also of a Kiln and two Lofts which the said *James Hunter* had then put up for his own Conveniency; or, in default thereof, to allow him to demolish the Pigeon-house, &c. and carry off the Materials.

Upon the late Lord *Kinnaird's* Death, and the present Lord's Accession, finding the Estate incumbered with Tacks of this Kind, some of the Tenants, conscious of the unjust Advantage they had grasped at by Means of the Facility of the late Lord, and the groundless Prejudice conceived by the Lady against her Husband's Heir, agreed to give up, or restrict, upon certain Terms, those illegal Tacks which they had obtained. But as *James Hunter* did not chuse to depart from any of the Advantages he fancied he had secured to himself by these Tacks and Prorogations, Lord *Kinnaird* was obliged to bring the present Action of Reduction: And the particular Tacks above mentioned are the Object of that Challenge.

This Process came, by a Remit from your Lordships, to be debated before Lord *Bankton Ordinary*; who was pleased to make Avisandum to your Lordships, and ordained both Parties to give in Informations: And since Lord *Bankton's* Death, the Cause having been remitted to Lord *Alemonor*, his Lordship has been also pleased to make Avisandum to your Lordships, and

ordained the Parties to lodge their Informations. In obedience to which Appointment, this is humbly offered on the Part of Lord Kinnaird, the Pursuer.

And, in the Entry, he will be allowed to observe, that tho' the several Heirs in a tailzied Succession have, to Appearance, the Fee or Property vested in them, it is, in reality, but a nominal Fee, where, by the Conditions of the Settlement, they can neither alienate, nor charge with Debt, nor do any other Act or Deed, prejudicial to the Interest of the succeeding Heirs, but must transmit the Estate *tantum et tale* as they received it: So that, however their Interest in said Estate may be dignified with the Name of a Fee, it is, in Effect, but a *Series of Life-rents*. There is a *jus crediti* vested in all the Substitutes, which the Heir in Possession cannot prejudge. He is, at best, but an *heres fideicommissarius*; and, as such, bound to transmit the Estate to the next Heir.

That he is intitled to the full Enjoyment of the Estate, Issues and Profits thereof, during his Incumbency, the Pursuer will readily admit; and, as a Consequence thereof, that every Act of reasonable Administration is competent: But that this should authorise the Commission of Acts manifestly calculated to distress the Heir in Expectancy, can, with no Justice, be maintained.

And therefore, though there is no express Prohibition in this Entail against setting of Tacks, or any Limitation, in point of Time, as to the Endurance for which Tacks may be granted; the general Prohibition, not to do any Act or Deed whereby the Estate may be affected, in prejudice and defraud of the subsequent Heirs of Tailzie, must strike against every Act, which, from the Circumstances of the Case, shall appear not to be an Act of reasonable and ordinary Administration, but to be calculated to hurt or prejudge the Interest of the succeeding Heir. And the Pursuer will submit it to your Lordships, from the general Complexion of these Tacks, and other Circumstances of the Case, that they manifestly appear to have been intended to distress

distress him, the Heir in Expectancy, when other Efforts to the same Purpose had proved abortive.

Where Tacks are granted for an adequate Rent, and for such a Number of Years as is justified by the common Usage and Practice of the Country, the granting such Tacks may justly be considered as an Act of reasonable and ordinary Administration.

But where they deviate from these, and are either granted for an elusory Rent, or for any uncommon Length of Time, they cease to be considered as Acts of Administration, and partake of the Nature of Alienations ; and thereby fall under the special Prohibition *de non alienando*, as well as under the general Prohibition against every Act and Deed whereby the Estate may be burdened or affected to the Prejudice of the succeeding Heirs.

So our Lawyers of the first Character have considered this Matter. Sir Thomas Craig, treating of this Matter *ex professo*, lib. 2. dieg. 10. § 5. establishes the Rule in these Words. *Affidatio pro novemdecim annis, ut et affidatio ad vitam, species est etiam alienationis; adeo ut qui alienare in jure prohibentur, neque ad novemdecim annos, neque pro vita affidare queant, quum factum illud periculo reductionis subfit.* Words cannot be more express. He considers a Lease, for a Space even of nineteen Years, or a Liferent-lease, to be of the Nature of an heritable Right, a *species alienationis* ; and, as a Consequence thereof, that no Proprietor of Lands, who, by Law, is restrained from alienating, can grant such Leases, but that they are liable to Reduction.

If the Tacks in question are to be judged of by these Rules, joined with the other Circumstances, from which it appears so evidently that they were calculated, and could have nothing in View but to distress the Pursuer, the Heir in expectancy, it would be counteracting the Scope and Purpose of the whole Settlement, the general as well as the special Prohibition, should these be sustained.

A few Observations respecting the different Tacks and Prorogations, will bring this more immediately under the Eye.

In 1738, when there were eleven Years of the then current Tack yet to run, the late Lord granted a Prorogation for twenty-five Years, to commence at the Expiry of the former Tack, which brings it down to the 1774. He was then so far advanced in Years, that it could not reasonably be expected he should outlive the then current Tack. So that this Prorogation was naturally expected to take Place after that the present Lord had succeeded to the Estate, and, for that Reason alone, was thought of being granted. He stipulates no additional Rent, nor any Grassum to be paid to the Heir in possession when the Prorogation should take Place, however notorious it was that the Land-rent all over *Scotland* was advancing apace. The Defender is laid under no Obligation beneficial to the Farm, beyond what he was bound to by the current Lease. No Man that had meant fair Things, no *bonus paterfamilias*, in the Administration of his own Affairs, would have been guilty of so irrational an A&t.

Some Pretence was wanting to palliate or justify a fresh Prorogation of that same Lease and former Prorogation. In this View, and in 1754, when twenty Years of the former Lease and Prorogation were yet to run, he grants to the same Person a Tack of another Part of the Estate, for the Space of thirty-eight Years, to commence at *Whitsunday* 1755; which therefore would not expire till the 1793.

And Matters being thus prepared, under Pretence that the Farms contained in these two Tacks, which hitherto had always been possessed as different Farms, without any apparent Inconveniency, were so intermixed, that they could not be laid out in proper Fields, or ditched and drained, whereby the Improvement of the Lands was impeded; therefore, and as an Encouragement to the Defender to ditch and drain said Lands, and lay them out in proper Fields, he grants the Defender a second

cond Prorogation, for other nineteen Years, to take Place at the Expiry of the former Tack and Prorogation.

When this second Prorogation was granted, in the Year 1757, Lord *Kinnaird* was a Man of near eighty Years of Age, and, to the Observation of every Mortal, in the very last Stage of Life. He could not have the most distant Expectation of surviving the Term when the former Tack and Prorogation were to expire. So that the Nature of the Thing speaks it, that the granting of this second Prorogation was intended to distress the Pursuer, his Heir, upon the same Plan that he had granted the like Tacks over the whole Estate, not excepting the very Mains.

But what is chiefly observable upon the Face of this Prorogation is, that though the Motives assumed for granting the same were, the pretended Connections of this Farm with the other Farm, of which he had then recently granted so long a Tack, and the great Advantages which might accrue by ditching, planting, &c.; from which one should naturally have concluded, that the Defender would have been taken bound to plant and inclose at least Part of the Grounds; nothing of this Kind is done; but, on the contrary, he is left as much at Liberty in these Respects, as if no such second Prorogation had been granted.

And this leads the Pursuer to observe another Specialty peculiar to this second Prorogation, that, as Matters were thereby cooked up, this Prorogation, *quoad* the Period when it was to take Place, was at a Distance of Time when there was an absolute Certainty that the Granter of the Tack must be many Years dead. A Tack of this Kind can have no Protection from the Statute 1449: And the Heirs of Entail are not liable, as representing their Predecessors, to Deeds of this Kind, granted in manifest Prejudice and Defraud of their Right.

Was this to be allowed, it would be in the Power of the Heir of Tailzie in possession to preoccupy the whole Benefits arising to the subsequent Heirs during their Possessions, by granting

Leases to commence at such distant Periods, and in consideration thereof, taking the Fines and Grassums to himself; which, in other Words, would be to anticipate the Profits and Issues of these Tacks, arising during the Possession of the subsequent Heirs.

It is upon this Principle that Sales of Woods made by an Heir of Tailzie in Possession, whereby the Purchaser is allowed a Number of Years to cut these, have been found ineffectual for any longer Time than the Life of the Seller, because the Profits of the Estate become the Property of the next Heir upon his Succession. So this Point was expressly adjudged in the late Question between Lord Cathcart and Sir Michael Stewart's Son, respecting the Estate of Greenock; though, with this Difference, that, in that Case, the Bargain of Sale took place, and the Purchaser of the Woods was to enter upon the Contract during the Lifetime of Sir John Shaw; whereas here, the second Prorogation was granted to commence and take effect no earlier than the 1774, when the former Lease and Prorogation was to expire.

And therefore, with regard to this Prorogation, which could not commence till the 1774; and upon which, of Consequence, no Possession followed before the late Lord's Death, which happened in July 1758; the Pursuer apprehends, that there is not the least Shadow of an Argument to maintain, that it can be effectual against the present Heir of Entail; that it is now established by your Lordships Decisions, That Possession, upon a former Tack, is not to be held as Possession upon a Prorogation of that Tack; and therefore such Prorogations have been found not to be effectual against singular Successors deriving Right from the Granter of the Tacks prior to the Term of Entry upon the Prorogation.

The contrary indeed was once found by your Lordships, in January 1725, *Richard contra Lindsay*, which is thus observed in the *Dictionary of Decisions*, vol. 2. p. 421. "A Proprietor, " during the Currency of a first Tack, having granted a second,

" to

" to commence at the Expiration of the former, did, after
 " the Date of the second Tack, but before Expiration of the
 " first, sell the Lands. The Question occurred, If this second
 " Tack was good against a singular Successor? On the one
 " hand, it was contended, That here was a Tack, and here
 " was Possession, all that was necessary by the Act of Parlia-
 " ment to make Tacks good against singular Successors. On
 " the other hand, it was contended, That no Tack is a real
 " Right, or good against singular Successors, unless that where-
 " upon Possession has actually followed: That the Tacksman
 " has all along been in Possession, by virtue of the first Tack;
 " and that the second Tack can, in no View, be considered as
 " any how better than a simple personal Obligement upon the
 " Proprietor to grant a new Tack to this Tacksman after Expi-
 " ration of the former; and which cannot be a more effectual
 " Obligation to him, than if granted to any third Party, who
 " never was in Possession; good indeed against the Granter,
 " but by no means against singular Successors. The Lords
 " sustained the second Tack good against the Purchaser."

But this Decision being clearly against Principles, your Lordships, in many Cases which have occurred since, have expressly determined, That a Prorogation is not to be considered as clothed w^tth Possession, so as to render it valid against singular Successors, until Possession has followed upon the Prorogation itself, after the Expiry of the former Tack. Thus, in a late Case, which will be recent in your Lordships Memories, between the Creditors of Lord Cranston and Thomas Scot of Stonedge, determined after a Hearing in presence, 20th June 1755, your Lordships found, That the Prorogation of a Tack granted by Lord Cranston to Scot, upon which Possession had not followed before the Creditors had led a great Number of Adjudications, and the Estate was sequestrate by the Court, could not be effectual; and therefore the Prorogation was set aside.

And, in like manner, in July 1757, in a Question which occurred between Robert and John Carlyles, and the other Credi-

tors of *Douglas of Dornock*, your Lordships found, That a Prorogation annexed to a Tack contained in an heritable Bond, by which the Tack was prorogated *from Year to Year*, after the Expiry, with Power of Retention of the Tack-duty ay and while the principal Sum in the heritable Bond remained unpaid, could not be effectual for the Year following the Sequestration, because of the Mid-impediment by which the Creditors entered into Possession before the Term of Entry of the Prorogation for that and subsequent Years.

Upon the Principles established by these two Decisions, the Pursuer does subsume, That the Prorogation in this Case, granted by the late Lord *Kinnaird*, cannot be effectual against the Pursuer, (who, in this Respect, must be considered as a singular Successor), because no Possession followed upon it during the Lifetime of the late Lord. The Possessor of an entailed Estate can exercise no Powers over it, which are to commence after his own Death. At that Period his Right is at an End; and the Right of another Heir of Entail takes place, who does not, in any Respect, represent the former Heir of Entail, nor is liable for his Debts or Deeds.

The Pursuer must further observe, in general, that the present Case is none of those where the Plea of the Tenant is at all favourable. He has possessed one of these Farms ever since the Year 1730; and, during the whole of that Period, he has neither inclosed nor made Drains in any Part of it, excepting only that, a good many Years ago, he cleaned out one or two old Drains, the Expence of which, the Pursuer is well informed, did not exceed L. 20 *Sterling*. The only Improvement which he has put in practice has been that of liming; and, for the last eight Years, the Pursuer does aver, and will peril the Cause upon it, that the Defender has not limed five Acres of Ground. Every Farmer in that Part of the Country knows, that the three Crops immediately following after Lime, fully repay the whole Expence laid out by the Farmer, and generally exhausts the Effects of that Manure, so as to leave the Land pretty much in

in the same Situation as before ; and therefore the present Defender has been already much more than fully recompensed for any Expence he may have laid out in the Cultivation of these Farms ; nor is the Farm in better Condition than when he entered to it.

On the other hand, the Injury which the Pursuer has suffered by these illegal, and he may call them malicious Prorogations, granted by the late Lord, is almost incredible. Neither of the Farms possessed by the Defender pay at present one half of the Rent which any Farmer in that Country would willingly pay for them, or would have paid at the Time the two last Tacks were granted. It is impossible, that the late Lord, or those about him, could be ignorant of this ; and therefore the Deed by which he attempted to alienate from his Heir so considerable a yearly Revenue, must appear extremely emolous upon his Part ; and the Conduct of the Defender, who elicited such Deeds from him, can be considered in no better Light than that of a most unpardonable Fraud. The Lesion is, in Fact, *ultra dimidium* ; and the Value of the Farm has not been at all owing to Improvements made by the Defender, but to the Nature of the Soil, and to its Vicinity to Lime, which has now become a general and very beneficial Method of Culture in that Part of the Country.

And therefore the Pursuer submits it to your Lordships, 1st, Whether the Prorogation granted for twenty-five Years on the 9th *October* 1738, when there were no less than eleven Years of the former Tack to run, and which was therefore to commence at *Michaelmas* 1749, is not reducible at the Pursuer's Instance ; a Tack which was set for less than half the Value of the Farm, not as an Act of ordinary Administration, but by a weak facile Man, in order to prejudge his Heir, at a Period when, in all Likelihood, he himself would be in his Grave ? 2^{dly}, Whether or not the Tack granted on the 30th *October* 1754, of another Farm, for no less than thirty-eight Years, and for a Rent which, in Comparison of the Value of the Farm, was in a Manner elusive, elicited by the Defender from a weak Man

Man at Variance with his Heir, and who was, at that Time, in the very last Stage of Life, ought not also to be set aside ; or at least reduced to such a reasonable Endurance, as, in the ordinary Exercise of Administration, a reasonable Man, in that Part of the Country, considering the Nature of the Soil, and the Encouragement proper to be given to a Farmer, would have granted ? And, 3dly, The Pursuer submits it, Whether it is possible, upon any Principles of Law, to sustain the last Prorogation, granted upon the 7th November 1757, eight Months before the late Lord's Death, the Entry upon which was not to take place till Michaelmas 1774, and to expire no earlier than the 1793 ; by means of which, if it were to be sustained, the Defender would possess this Farm for above thirty Years to come, at less than half its Value, in consequence of a Deed very unfairly elicited from a weak dying Man, by taking Advantage of an unjust Prejudice, infused into him by others, against his natural Heir ?

In respect whereof, &c.

ALEX. LOCKHART.

